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Title: On Time in Just War Theory: From *Chronos* to *Kairos*

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Abstract:

This paper examines the role of time in Just War theory. It maintains that contemporary Just War theory's legalist focus on rules and principles, rather than judgment and interpretation, makes a serious engagement with timing appear quite irrelevant. To deal with this shortcoming, the paper clarifies the dual nature of political time as both *chronos* and *kairos*. It is argued that a cogent account of the justice of warfare needs to incorporate the two faces of political time. I show that a casuistic re-orientation of Just War theory would also have the beneficial effect of putting critique back on the agenda. The moral core of my argument is that judgment and interpretation ought to be guided by the spirit of "pragmatic fallibilism", thereby combining the willingness to assertively uphold one's values with a disposition to revise, through reflection and deliberation, one's commitments.

I. Timing: An Undertheorized Dimension of Political Action

In the late summer of 2012, Israeli politicians considerably raised the pressure on Iran by asserting that the time for diplomacy around Iran's nuclear program was about to run out. The underlying threat was, of course, unambiguous: either Iran yielded to the demands of dismantling its nuclear program, or fatal strikes would be launched on its research facilities.¹ Israeli politicians sought to substantiate their dark warnings through the notion of "preventive self-defense" – a concept that stands on shaky ground from the standpoint of international law. As we know today, Israel has not (yet) followed up on its threat; but this kind of rhetoric is all too common in our days. One way of looking at this ongoing standoff would be in terms of specifying the reasons for preemptive attacks: What sorts of imminent threat from a state or non-state actor would allow the targeted state to engage in a preemptive attack, which is legitimate under international law? Do we need to re-think the crucial difference between prevention and preemption in light of evolving types of coercion, such as the covert development of nuclear weapons capability?² A different way of seeing Israel's pressure on Iran would be as an effort to control political time. By intimating that diplomacy had run its course, Israel tried to regain the upper hand in the controversy

¹ Isabel Kershner, "Israeli Foreign Ministry Calls for More Sanctions on Iran," *The New York Times*, September 27, 2012, sec. World/Middle East, <http://www.nytimes.com/2012/09/28/world/middleeast/israeli-foreign-ministry-calls-for-more-sanctions-on-iran.html>.

² On the discussion around prevention and preemption see: Michael W. Doyle, *Striking First: Preemption and Prevention in International Conflict*, ed. Stephen Macedo (Princeton: Princeton University Press, 2008); David Luban, "Preventive War," *Philosophy and Public Affairs* 32, no. 3 (2004): 207–48; Henry Shue and David Rodin, eds., *Preemption: Military Action and Moral Justification* (Oxford: Oxford University Press, 2007).

over Iran's nuclear weapons. Interestingly, the American Presidential elections supplied an important temporal layer: pundits insisted that the elections' date would mark a watershed moment for Israel's capacity to start an attack.³ On this perspective, the chief questions are: When is the right time for a political or military initiative? Which critical tools do we have to evaluate the claims of political actors that the time is right to strike?

In what follows, I pursue two goals: The first is to elucidate why Just War theorists have until now mostly ignored the topic of time. To put my argument in a nutshell, the reason has to do with contemporary Just War theory's methodological bent towards rules and principles, at the expense of case-based reasoning.⁴ In its drive towards – what Judith Shklar called – legalism, contemporary Just War theory tends to conceive of time purely in terms of a measure (*chronos*), instead of paying attention to the complex ways in which time structures action (*kairos*). The paper's second goal is to sketch the moral core of an alternative vision of Just War theory, in which both sides of political time – *chronos* and *kairos* – are given their due. Once we realize that it is problematic to conceive of time purely in terms of a measure, it

³ Joshua Gleis, "How the Presidential Election Could Lead to an Israeli Strike on Iran," *Huffington Post*, June 3, 2012, http://www.huffingtonpost.com/joshua-gleis/obama-israel-iran_b_1322934.html.

⁴ According to my understanding, "case-based reasoning" is synonymous with casuistry – a philosophical method in ethics that will be discussed in detail in section II. I therefore invite the reader to interpret "casuistic" throughout this paper in a non-polemical way; or, to put it more precisely: in line with Jonsen and Toulmin's main idea, I seek to rescue casuistry from its disrepute, by demonstrating that it "redresses the excessive emphasis placed on universal rules and invariant principles by moral philosophers and political preachers alike". See: Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988), 13.

becomes imperative to casuistically investigate the empirical circumstances of justice within which a political or military initiative is launched. I shall argue that the necessary faculties of judgment and interpretation need to be guided by the spirit of “pragmatic fallibilism”, thereby combining the willingness to assertively uphold one’s values with a disposition to revise, through reflection and deliberation, one’s commitments. That is why this paper’s gist is constructive, and not polemical; its objective is to remedy a shortcoming in a particular strand of Just War theory so as to render the discussion around the permissible use of force more productive.

The outline of the paper is as follows: I begin by delineating the Just War tradition’s genealogy and clarify the extent to which rules and principles have become the focal point in the contemporary debate. Then, I illustrate how this methodological bent impinges on the understanding of time in contemporary Just War theory (section II). The next step leads me to unpack the prevalent distinction in ancient Greek, and later Roman culture between *chronos* and *kairos*. The purpose of this turn to ancient philosophy is to recuperate for the contemporary debate the idea that normal, measurable time (*chronos*) should to be held apart from qualitative, actionable time (*kairos*) (section III). Finally, I submit that, for a critical approach to Just War theory, we need a complex understanding of political time that brings together its *chronotic* and its *kairotic* elements. I conclude by gesturing towards the idea of “pragmatic fallibilism” to illuminate how judgment and interpretation can assist us in making sense of political time. The idea here is that, if we are to steer Just War theory towards a stronger commitment to contextual analysis, it will be beneficial to mobilize some of the key insights of pragmatism – not in terms of a full-fledged system to rival legalism, but rather as a flexible framework that could orient the judging and interpreting of real-world conflicts (section IV).

I.1. Preliminary Caveats

Before proceeding with the substantive argument, three short provisos on the paper's objectives are in order: (1) My referring to "Just War theory" might be read as if there was only one, uniform way of thinking about justice in war. Just War theory today is, of course, a pluralistic enterprise that contains many different, sometimes conflicting approaches.⁵ Therefore, the paper concedes that not every strand of Just War theory will necessarily conform to the picture I shall paint. To be clear from the outset, my concerns will mainly be channeled at one particular, legalist strand that pays scant attention to contextual factors when assessing the morality of warfare.

(2) Even though a reflection on political time cannot be found in the literature, my objections to some strands in Just War theory build on an already well-established corpus of critiques. Several commentators have recently commenced to interrogate its overly legalistic character.⁶ As with any form of critique, the issue is whether it aspires to be radical or remedial; that is, whether it rejects a set of ideas in its entirety, or whether it strives to renegotiate a hegemonic reading of these ideas. The arguments

⁵ For some of the most important recent contributions see: Alex J. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity Press, 2006); Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Jeff McMahan, *Killing in War*, Uehiro Series in Practical Ethics (Oxford: Clarendon Press, 2009); David Rodin and Henry Shue, eds., *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford/New York: Oxford University Press, 2008).

⁶ For a good overview of these critical positions see the articles in *Ethics and International Affairs* 27, no. 1 (2013). An important resource for those who wish to revise contemporary Just War theory's focus on abstract rules and principles is the *Journal of Military Ethics*, whose authors regularly engage in the kind of exercise I am advocating as well. See also: Andrew G. Fiala, *Practical Pacifism* (New York: Algora Publishing, 2004); Andrew G. Fiala, *The Just War Myth: The Moral Illusions of War* (Lanham: Rowman & Littlefield, 2008).

about time proposed in this paper fall within the remedial camp. I thus remain committed to the assumption that assessing the use of force is an important endeavor we should not forsake. Yet, I would also assert that we must alter the framework within which this assessment is often undertaken.

(3) Finally, I need to make explicit whom this paper ideally addresses. My argument is simultaneously geared towards two audiences: political actors and critics. By pleading for more judgment and interpretation in reaching a decision, the paper raises the bar of responsibility for political actors who plan to use force. At the same time, this framework enables critics to check whether those with authority have indeed met their obligations when deciding about a military initiative. It is in this vein that the following thoughts are supposed to be beneficial for both prospective action-guidance and retrospective appraisal.

II. Just War Theory: From Case-Based Reasoning to Analytical Construction

Questions of timing undoubtedly pervade many debates in global politics, as numerous cases indicate, from the delayed reaction to the genocide in Rwanda to the enduring crisis in Syria. Whereas empirical political scientists have envisaged political time as a suitable topic of inquiry for quantitative research, institutional design and policy analysis⁷, political theorists have only lately commenced to pay more attention to the normative nature of time. This interest has led them to scrutinize

⁷ For a representative selection of recent publications see: Suzanna De Boef and Luke Keele, “Taking Time Seriously,” *American Journal of Political Science* 52, no. 1 (2008): 184–200; Juan J. Linz, “Democracy’s Time Constraints,” *International Political Science Review/Revue Internationale de Science Politique* 19, no. 1 (1998): 19–37, doi:10.2307/1601292; Stephen Skowronek, *Presidential Leadership in Political Time: Reprise and Reappraisal* (Lawrence: University Press of Kansas, 2008).

such diverse issues as cosmopolitanism⁸, sovereignty⁹, deliberation¹⁰ and democracy¹¹. From an International Relations perspective, scholarly attention to the intricacies of political time in the context of war has begun to increase as well. To name just two influential interventions in this debate: (1) Taking his cue from the seminal work of Paul Virilio¹², James Der Derian develops a post-structuralist approach to warfare that highlights, amongst other aspects such as simulation and surveillance, its “chronopolitical” dimensions.¹³ Over the past 20 years, Der Derian has been arguing that we cannot grasp the changing nature of international relations without acknowledging that pace has become more important than space.¹⁴ (2) By looking at technological revolutions, Herfried Münkler succinctly analyzes the relationship

⁸ Kimberly Hutchings, “What Is Orientation in Thinking? On the Question of Time and Timeliness in Cosmopolitical Thought,” *Constellations* 18, no. 2 (2011): 190–204, doi:10.1111/j.1467-8675.2011.00633.x.

⁹ Paul W. Kahn, “Political Time: Sovereignty and the Transtemporal Community,” *Cardozo Law Review* 28, no. 1 (2006): 259–76.

¹⁰ Sheldon S. Wolin, “What Time Is It?,” *Theory & Event* 1, no. 1 (1997), doi:10.1353/tae.1991.0003.

¹¹ Robert E. Goodin, “Keeping Political Time: The Rhythms of Democracy,” *International Political Science Review/Revue Internationale de Science Politique* 19, no. 1 (1998): 39–54.

¹² Paul Virilio, *Speed and Politics: An Essay on Dromology* (New York: Columbia University, 1986).

¹³ James der Derian, “The (S)pace of International Relations: Simulation, Surveillance, and Speed,” *International Studies Quarterly* 34, no. 3 (1990): 295–310, doi:10.2307/2600571.

¹⁴ Several of Der Derian’s essays grapple with the topic of speed. See in particular the following edition of selected papers: James Der Derian, *Critical Practices in International Theory: Selected Essays* (London/New York: Routledge, 2009). For a book-length treatment see the earlier: James Der Derian, *Antidiplomacy: Spies, Terror, Speed, and War* (Cambridge: Blackwell, 1992).

between military power and the ability to control the speed of a conflict.¹⁵ Münkler's investigations of the variable effects of acceleration have disclosed that time is a malleable, and often surprising resource in warfare: in an asymmetrical conflict, for example, the weaker side has a strategic interest in decelerating the violence.¹⁶ However, while both Der Derian and Münkler seek to thoroughly describe, explain and deconstruct the complex role of speed in various types of warfare, they deliberately refrain from engaging with the normative questions that lie at the heart of this paper's concerns.

II.1 The Drive Towards Legalism

If we resolve to confront these normative questions, it quickly becomes evident that time poses a peculiar challenge for Just War theory – it cannot be neatly incorporated in an ethical theory that is chiefly concerned with the direct application of rules and principles. To put it otherwise: an ethical theory that pays scant attention to the intricacies of real-world conflicts will approach decisions over timing through the lens of pre-defined rules and principles. As I shall try to show, the drive towards legalism

¹⁵ Herfried Münkler, "Temporal Rhythms and Military Force: Acceleration, Deceleration, and War," in *High-Speed Society: Social Acceleration, Power, and Modernity*, ed. Hartmut Rosa and William Scheuerman (University Park: Pennsylvania State University Press, 2009), 243–59. If we look at the broader picture, scholars working in the tradition of Critical Theory have over the past 15 years started to dissect the topic of speed in illuminating ways. See exemplarily: William E. Connolly, "Speed, Concentric Cultures, and Cosmopolitanism," *Political Theory* 28, no. 5 (October 2000): 596–618, doi:10.2307/192290; Hartmut Rosa, *Social Acceleration: A New Theory of Modernity*, New Directions for Critical Theory (New York: Columbia University Press, 2013).

¹⁶ Herfried Münkler, "The Wars of the 21st Century," *International Review of the Red Cross* 85, no. 849 (2003): 7–22, doi:10.1017/S0035336100103508.

has the implication that the complexity of these decisions is significantly underestimated.

In order to elucidate this claim, let us take off by pointing to the far-reaching transformation Just War theory has been going through.¹⁷ In keeping with Nicholas Rengger's narrative of this transformation, I will in very broad brushes sketch the shift away from case-based reasoning towards a legalist framework.¹⁸ Rengger puts forth the claim that in its early days Just War theory was primarily a project of "practical reasoning"¹⁹, in the broadest sense of the term. "Practical reasoning" is shorthand for the method of casuistry, i.e., for the attempt to develop moral arguments from particular cases. Casuistic moral arguments do not pretend to work in all circumstances – they only operate in specific contexts, for specific reasons, and with specific effects.²⁰ In its classical configuration up until the Middle Ages, Just War thinking was first and foremost geared towards the question when and how a

¹⁷ For two books that provide a thorough overview of this topic see: Cian O'Driscoll, *The Renegotiation of the Just War Tradition and the Right to War in the Twenty-First Century* (New York: Palgrave Macmillan, 2008); Charles Reed and David Ryall, eds., *The Price of Peace: Just War in the Twenty-First Century* (Cambridge/New York: Cambridge University Press, 2007).

¹⁸ Space constraints prevent me from doing justice to the rich history of Just War theory. As a consequence, I restrain myself to recounting a story that sticks closely to Rengger's narrative. After I had finished this essay, it came to my attention that Rengger has recently published a book-length treatment of the just War tradition, which I unfortunately could not include in this paper. See: Nicholas Rengger, *Just War and International Order: The Uncivil Condition in World Politics* (Cambridge: Cambridge University Press, 2013).

¹⁹ Nicholas Rengger, "On the Just War Tradition in the Twenty-First Century," *International Affairs* 78, no. 2 (2002): 360, doi:10.1111/1468-2346.00255.

²⁰ For the most comprehensive historical account of casuistry see: Jonsen and Toulmin, *The Abuse of Casuistry*.

sovereign ruler may resort to violence.²¹ In medieval Europe, Just War theory was supposed to directly guide a sovereign when he considered using force to protect the political community he was responsible for. At the heart of these references to Just War was the distinction between the legitimate public use of force (*bellum*) and the illegitimate private use of force (*duellum*).²² It was, in short, a tradition in the ethics of statecraft.

In the course of the 17th century this type of reasoning – steering the sovereign towards a sensible decision to use force – was, however, gradually supplanted by an emerging kind of natural rights theory. The central figure in this development was the Dutch statesman and scholar Hugo Grotius, a Renaissance humanist whom many deem the founding father of modern international law.²³ A useful way of

²¹ In this context, Augustine's thinking proved fertile. For example, medieval European conflicts, like the Hundred Year's War, were subject to Augustinian lines of moral reasoning. See: Frederick H. Russell, "Love and Hate in Medieval Warfare: The Contribution of Saint Augustine," *Nottingham Medieval Studies* 31, no. 1 (1987): 108–24, doi:10.1484/J.NMS.3.146. On Just War reasoning in the Middle Ages more generally see: Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge/New York: Cambridge University Press, 1975).

²² Charles T. Mathewes, *Understanding Religious Ethics* (Chichester/Malden: Wiley-Blackwell, 2010), 187–188; George Weigel, "The Development of Just War Thinking in the Post-Cold War World: An American Perspective," in *The Price of Peace: Just War in the Twenty-First Century*, ed. Charles Reed and David Ryall (Cambridge/New York: Cambridge University Press, 2007), 24, 28.

²³ For a comprehensive summary of the genesis of natural rights theories see: Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999). On Grotius' place in the history of international law and politics, see: Hedley Bull, Benedict Kingsbury, and Adam Roberts, eds., *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990); Renée Jeffery, *Hugo Grotius in International Thought* (New York: Palgrave Macmillan, 2006).

characterizing this shift is to describe it as a move towards “legalism”. Judith Shklar, who was the first to employ the notion of legalism, uses the term in order to capture an “ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules”²⁴. Shklar’s admonitions of the perils of legalism need not concern us here, but the general ideology she seeks to comprehend is useful for characterizing Just War theory. Legalism in Just War theory is a “method of reasoning about the constraints on the use of force [...] that is based primarily on the formulation of lawlike precepts”²⁵. As Rengger argues, the new paradigm marks a drastic change within Just War theory itself:

The dominance in the modern world of notions that emphasize universally applicable moral rules by definition makes the kind of moral reasoning prevalent in the medieval and early modern just war tradition – casuistical, particularist, case-based – extremely difficult. However, there remains the requirement for some sort of “just war tradition” in reflecting on, accounting for and legitimating Western societies’ decisions to go to war. The result has tended to be the “legalization” of the tradition [...] – and also an attempt to create a just war *theory* [...], to be used as a kind of moral slide-rule from which legitimate instances of the use of force can be read off whenever necessary.²⁶

²⁴ Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1986), 1.

²⁵ George Lucas, “Defense or Offense? The Two Streams of Just War Theory,” in *War and Border Crossings: Ethics When Cultures Clash*, ed. Peter A. French and Jason A. Short (Lanham: Rowman & Littlefield, 2005), 50.

²⁶ Rengger, “On the Just War Tradition in the Twenty-First Century,” 360.

The metaphor of the “moral slide-rule” is supposed to convey the impression that case-based reasoning has historically been superseded; in its place, a proper system of rules and principles asserted itself through a complicated series of developments, which eventually culminated in the creation of Just War *theory* in the more emphatic sense. As pointed out above, the main catalyst in these developments has been the rise of natural rights thinking, most prominently advanced by Grotius’ *The Rights of War and Peace*, which established the distinction between the rules of waging war (*jus ad bellum*) and the rules of warfare (*jus in bello*).²⁷ As Alex Bellamy has persuasively demonstrated, Grotius’s legalism provided the philosophical foundations for the development of international law as well as for the subsequent ethical reflection on the use of force.²⁸

While it is, of course, important to acknowledge the diversity of views collected under the moniker “Just War theory” today, it is instructive to identify powerful trends. The “practical reasoning” approach to Just War has seen a remarkable revival in recent years, especially through the works of Paul Ramsey, Jean Bethke Elshtain and James Turner Johnson²⁹; but these Augustinian positions remain slightly marginalized in

²⁷ Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), 393, 1186. On the transition to early modern Just War theory see: Mark Evans, “Moral Theory and the Idea of a Just War,” in *Just War Theory: A Reappraisal*, ed. Mark Evans (New York: Palgrave Macmillan, 2005), 1–21.

²⁸ Bellamy, *Just Wars*, 8, 71–75.

²⁹ See representatively: Paul Ramsey, *The Just War: Force and Political Responsibility* (Lanham/Oxford: Rowman & Littlefield, 2002); Jean Bethke Elshtain, *Augustine and the Limits of Politics* (Notre Dame: University of Notre Dame Press, 1995); James Turner Johnson, *Morality & Contemporary Warfare* (New Haven: Yale University Press, 1999); Jean Bethke Elshtain, “Why Augustine? Why Now?,” *Catholic University Law Review* 52 (2003 2002): 283; James Turner Johnson,

contemporary academic discourse. Just War theory today is dominated by a paradigm that is much more aligned with Grotius' rule-based approach than with Augustine.³⁰ What is more, the rule-based approach is typically promoted by those who have been "trained in the analytic tradition"³¹. Perhaps it might be overstated to call this approach the sole mainstream in the current debate, but it is not exaggerated to claim that it articulates a very influential position that has gained in visibility over the last decades. The following arguments will hence be directed at this specific stream within Just War theory.

Theorists trained in the analytic tradition often conceive of Just War theory along the lines of lawlike precepts, without paying much attention to the complexity of real-world issues. We can perceive this by looking at how empirical claims are generally treated in legalist Just War theory. Theorists proceed in different directions. The most common path is to first establish the principles and rules of a Just War in an ideal sense, and then apply those to specific cases. Here, we obviously find an engagement with the real world, but the account given of the cases is itself secondary to the

Just War Tradition and the Restraint of War: A Moral and Historical Inquiry (Princeton: Princeton University Press, 1981).

³⁰ Possibly the most prominent author in the contemporary debate who has been trying to show, through a multi-volume project on the crimes prosecuted at Nuremberg, that both Just War theory and international in fact rest on the same Grotian foundations is Larry May. See his books: *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005); *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007); *Aggression and Crimes Against Peace* (New York: Cambridge University Press, 2008); *Genocide: A Normative Account* (Cambridge: Cambridge University Press, 2010).

³¹ Jeff McMahan, "Rethinking the 'Just War,' Part 1," <http://opinionator.blogs.nytimes.com>, *Opinionator*, November 11, 2012, <http://opinionator.blogs.nytimes.com/2012/11/11/rethinking-the-just-war-part-1/>.

development of principles and rules of a Just War. The focus on pre-established norms guarantees that the practice of casuistry is contained to a bare minimum. Judgment and interpretation have therefore not been entirely discarded in legalist Just War theory; indeed, they are indispensable for the application of abstract norms to particular cases. In Kantian terminology, this model is called “determinant” judgment, whereby given particulars are subsumed under a universal category. This model does not reject empirical claims about conflicts altogether, but they are relegated to a place where they do not have an impact on the rules and principles themselves. The influential work of so-called “revisionist” Just War theorists, who hope to overthrow the moral equality of combatants, illustrates this statement. Although these revisionists acknowledge the changing nature of warfare as one of the drivers behind their refutation of some *jus in bello* principles, it would be hard to deny that their discussions remain curiously anodyne in terms of engaging with actual conflicts.³² We may contrast this approach with a more radical one in which legalism leads to an account that is completely devoid of any empirical claims. Accordingly, some proponents of Just War theory pursue the route of what I would dub “pure analytical construction”, where all the examples in the text are hypothetical or counterfactual.³³

³² I don’t believe it is necessary to provide extensive evidence to underscore this observation. I would invite a skeptic to look into McMahan’s writings for an illustration: McMahan, *Killing in War*; Jeff McMahan, “The Just Distribution of Harm Between Combatants and Noncombatants,” *Philosophy & Public Affairs* 38, no. 4 (2010): 342–79, doi:10.1111/j.1088-4963.2010.01196.x. Cécile Fabre’s approach is a notable exception to this general tendency, as she seems more convinced of the importance of historical examples for normative theorizing. (Fabre, *Cosmopolitan War*, 15.)

³³ For a systematic critique of the use of imaginary cases in ethics, see: Michael Davis, “Imaginary Cases in Ethics: A Critique,” *International Journal of Applied Philosophy* 26, no. 1 (2012): 1–17, doi:10.5840/ijap20122611.

In these idealizing approaches, we detect no real world cases at all anymore, only highly stylized “Baby Killer Nations”³⁴, fictitious states like “Kazanistan”³⁵, and otherworldly figures such as the “Innocent Aggressor”³⁶. Without too much effort, we might be able to guess on which real-world countries or people these hypothetical or counterfactual examples are based – in fact, the parsimonious description of Rawls’s imaginary “Kazanistan” has been criticized for reproducing stereotypes about existing Muslim societies.³⁷ The purpose of introducing fictional states or persons, though, is precisely to shield the theory from any contagion with impure reality. Far from being the exclusive privilege of philosophers residing in the ivory tower, this style of exploring the morality of war has found its way into military academies: the so-called “trolley problem”³⁸, another famous thought experiment in ethics with endless

³⁴ F. M. Kamm, “Terrorism and Intending Evil,” *Philosophy and Public Affairs* 36, no. 2 (2008): 164, doi:10.1111/j.1088-4963.2008.00131.x.

³⁵ John Rawls, *The Law of Peoples; With, The Idea of Public Reason Revisited* (Cambridge: Harvard University Press, 1999), 75–78.

³⁶ Michael Otsuka, “Killing the Innocent in Self-Defense,” *Philosophy and Public Affairs* 23, no. 1 (1994): 74–94.

³⁷ Anne Norton, *On the Muslim Question* (Princeton: Princeton University Press, 2013), 94–117.

³⁸ The “trolley problem”, which by now has seen several formulations, seeks to examine the moral stringency of the distinction between doing and allowing harm. One of its best-known designs can be summarized in the following manner: “You’re standing by the side of a track when you see a runaway train hurtling toward you: clearly the brakes have failed. Ahead are five people, tied to the track. If you do nothing, the five will be run over and killed. Luckily you are next to a signal switch: turning this switch will send the out-of-control train down a side track, a spur, just ahead of you. Alas, there’s a snag: on the spur you spot one person tied to the track: changing direction will inevitably result in this person being killed. What should you do?” (David Edmonds, *Would You Kill the Fat Man? The Trolley Problem and What Your Answer Tells Us About Right and Wrong*, 2014, 183.) The original thought

variations, is nowadays firmly established on the mandatory Philosophy curriculum at West Point.³⁹

II.2 Problems with the “Moral Slide-Rule”

What exactly is the problem with Just War theory as “moral slide-rule”, then?

Nobody could reasonably deny that a slide-rule (and its modern descendant, the digital computer) is a convenient instrument for solving problems the human mind can barely master. But the same is not true for tackling quandaries such as the problem of when the time is right for a political or military initiative. In order to come to terms with these situations, we need something different than an algorithm, no matter how sophisticated and elegant its design is. Obviously, with regard to Just War theory, this does not imply that rules and principles are of no significance at all. Such a view would be self-defeating: How should we assess the justice of *anything*, if we had no rules and principles whatsoever at our disposal?

Still, the metaphor of the “moral slide-rule” intimates that something has gone astray if a system of norms completely overshadows case-based reasoning. The problem with Just War theory as “moral slide-rule” is not so much that it is insufficiently refined to compute all the variables and dimensions involved in serious quandaries.

experiment can be found in: Philippa Foot, “The Problem of Abortion and the Doctrine of the Double Effect,” in *Virtues and Vices and Other Essays in Moral Philosophy* (Oxford/New York: Oxford University Press, 2002), 19–32; Judith Jarvis Thomson, “Killing, Letting Die, and the Trolley Problem,” *The Monist* 59, no. 2 (1976): 204–17.

³⁹ David Edmonds, “Lessons in Morality at West Point,” *BBC*, September 18, 2010, <http://news.bbc.co.uk/1/hi/9006784.stm>; David Edmonds, “Matters of Life and Death,” *Prospect Magazine*, October 7, 2010, <http://www.prospectmagazine.co.uk/magazine/ethics-trolley-problem/#.Uh35zmSDSUY>.

Rather, it is that legalist Just War theory confronts us with a skewed vision of morality, which lays excessive stress on the rules and principles, while minimizing case-based reasoning. When turning to a machine for help with difficult calculations, we sensibly expect it to come up with fast answers that are unequivocally correct. But such answers cannot be found in complex political realities.⁴⁰ Therefore, in its drive to legalism, Just War theory promises more than it can keep – to render politics less messy, and to purify its muddy waters.⁴¹

All this is not to say that the faculties of judgment and interpretation have completely disappeared from Just War theory as it is practiced today. They remain indispensable for applying rules and principles to the real world. Yet, many political theorists focus their energy on perfecting the algorithm of the “moral slide-rule”, instead of engaging with the complexity of real-world cases.⁴² Therefore, this paper merely proposes a re-balancing of Just War theory such that the judging and interpreting of real-world

⁴⁰ C. A. J. Coady, *Messy Morality: The Challenge of Politics*, Uehiro Series in Practical Ethics (Oxford: Oxford University Press, 2008).

⁴¹ To render it somewhat more starkly: the “moral slide-rule” will be of comfort to those who cannot bear subscribing to a tragic vision of politics. On the relationship between tragedy and politics, see: Toni Erskine and Richard Ned Lebow, eds., *Tragedy and International Relations* (Houndmills, Basingstoke, Hampshire; New York: Palgrave Macmillan, 2012); Richard Ned Lebow, *The Tragic Vision of Politics: Ethics, Interests, and Orders* (New York: Cambridge University Press, 2003); Michael Neu, “The Tragedy of Justified War,” *International Relations* 27, no. 4 (2013): 461–80, doi:10.1177/0047117813483434.

⁴² In an excellent analysis of Just War theory’s usefulness for understanding counterterrorism measures, Neta Crawford makes exactly the same point when she writes: “Ethical traditions are not checklists or simple codes of conduct – they are tools for evaluating options and assessing behavior. As such, the questions that an ethical tradition raises may not have clear and simple answers.” (Neta C. Crawford, “Just War Theory and the U.S. Counterterror War,” *Perspectives on Politics* 1, no. 1 (2003): 21.)

cases operate on an equal par with the elaborating on rules and principles. The suggestion is not to dismiss rules and principles altogether, but rather to invite political theorists to grapple more directly with particular cases. Whereas yearning for the (presumably) golden age of casuistry would be illusionary, practical reasoning has in the contemporary debate become sidelined to such a degree that the plea for more engagement with conflicts in the real world is more urgent than ever. This call for case-based reasoning echoes and hopefully amplifies analogous critiques in other corners of the academic community: constructivist International Relations scholars, for example, have recently postulated the emergence of a “practice turn” in their discipline.⁴³ Similarly, the aforementioned adherents of the Augustinian strand in Just War theory have been skeptical of the analytical constructions in the legalist mainstream.⁴⁴

⁴³ Emanuel Adler and Vincent Pouliot, “International Practices,” *International Theory* 3, no. 01 (2011): 1–36, doi:10.1017/S175297191000031X; Chris Brown, “The ‘Practice Turn’, Phronesis and Classical Realism: Towards a Phronetic International Political Theory?,” *Millennium - Journal of International Studies* 40, no. 3 (2012): 439–56, doi:10.1177/0305829812441893; Vincent Pouliot, “‘Subjectivism’: Toward a Constructivist Methodology,” *International Studies Quarterly* 51, no. 2 (2007): 359–84, doi:10.1111/j.1468-2478.2007.00455.x.

⁴⁴ James Turner Johnson nicely captures his vision of Just War theory when he writes: “Implicit in all that I have been saying thus far is a rejection of yet another conception: that just war tradition has only to do with ideas and thus is abstractly remote from real-world circumstances, which require not ideas but actions. This is far from the truth. Just war tradition represents above all a fund of *practical* moral wisdom, based not in abstract speculation or theorization, but in reflection on actual problems encountered in war as these have presented themselves in different historical circumstances.” (James Turner Johnson, *Can Modern War Be Just?* (New Haven: Yale University Press, 1984), 15.) On Jean Bethke Elshtain’s move away from legalism, see: O’Driscoll, *The Renegotiation of the Just War Tradition and the Right to War in the Twenty-First Century*, 102.

Inspired by these suggestions, the final section will propose “pragmatic fallibilism” as a framework for thinking through time in warfare. Before delineating this alternative vision, however, let us examine the impact legalism has on the treatment of time. The shift away from casuistic moral arguments makes it difficult to treat decisions over timing in as subtle a way as they deserve. This is so because any contentious issue about whether the time for an initiative is, or is not, right becomes quickly absorbed by the “moral slide-rule”. By this I mean that a legalist understanding of the justice of warfare leads to the belief that decisions over the resort to force can be undertaken straightforwardly: by simply looking at the rules and principles that constitute the moral core of mainstream Just War theory. Just War theory in its currently dominant configuration operates on a simplistic understanding of time, and on an inflated appreciation of rules and principles. The main problem is hence that it conflates all issues of timing with *chronos*, without giving proper concern to *kairos* – a distinction the next section will elaborate on in more detail. This is an omission that can be remedied by adjusting Just War theory’s focus on rules and principles. Relinquishing the “moral slide-rule” certainly has the consequence that we abandon the ambition to allay doubts about timing once and for all. An excessive stress on analytical construction, as it is prevalent in some circles of moral philosophy, distracts us from the task of appraising the various factors that need to be accounted for if Just War theory is to play a role at all in critically evaluating warfare. Neglecting this task is a mistake. If Just War theory hopes to have any practical impact at all, it needs to widen its arsenal of criteria for the permissible use of force. The motive for this broadening of the horizon is that casuistic reasoning crucially depends on the “refined capacity to discern the morally relevant similarities and differences between cases”⁴⁵. These

⁴⁵ Jonsen and Toulmin, *The Abuse of Casuistry*, 151.

factors comprise not only the traditional provisions of *jus ad bellum*, *jus in bello* and *jus post bellum*, which continue to be pivotal for the normative assessment of warfare; they also cover more mundane issues, such as reviewing material resources, garnering popular support, establishing which rights and interests are being threatened or violated, and analyzing the potential enemy's resources and morale.

All these issues are intimately connected to questions of timing. In the paper's final section I will hone in on this connection by looking at three examples of real-world conflicts and their repercussions. Due to its stress on lawlike precepts, Just War theory of the legalist variety fails to account for the complex ways in which time structures action. This dimension of political time, which the next section will explore in detail, profoundly affects the normative assessment of warfare. Re-balancing Just War theory therefore implies that we pay closer attention to the empirical circumstances of justice. Unless these circumstances are included in the normative assessment of warfare, our thinking will remain hampered by a one-dimensional grasp of the conditions under which political and military initiatives can gain legitimacy.

III. *Chronos* and *Kairos*

I will take as a starting point for the upcoming reflections the ancient Greek and then Roman distinction between two kinds of time: *chronos* and *kairos*. Scholars of classical rhetoric have devoted extensive commentaries to this distinction.⁴⁶ In

⁴⁶ Michael Carter, "Stasis and Kairos: Principles of Social Construction in Classical Rhetoric," *Rhetoric Review* 7, no. 1 (1988): 97–112, doi:10.2307/465537; Phillip Sipiora and James S. Baumlin, eds., *Rhetoric and Kairos: Essays in History, Theory, and Praxis* (Albany: State University of New York Press, 2002); John R. Wilson, "Kairos as 'Due Measure,'" *Glotta* 58, no. 3/4 (1980): 177–204, doi:10.2307/40266516. The edited volume by Sipiora and Baumlin also includes an extensive bibliography on the research on *kairos*. For an informative philological study see: Manfred Kerkhoff,

Christian theology *kairos* occupies a prominent place as well: the standard Greek translation of “appropriate time” in the Septuagint refers to *kairos*, and not to *chronos*.⁴⁷ Furthermore, modern theologians have tried to recover the potential of *kairos* for contemporary debates. Among the most influential appropriations of *kairos* in 20th Century political theology is Paul Tillich’s Protestant existentialism.⁴⁸ Tillich’s multi-faceted interpretation of *kairos* as an exceptional moment of individual and societal transformation is relevant for this paper insofar as his writings had significant impact on the intellectual development of classical realist thinkers, such as Reinhold Niebuhr. Whereas this influence is in itself noteworthy, these thinkers, whose positions have been informed by political theology in general, and not only by Tillich’s Protestant existentialism – from Hans Morgenthau to George Kennan – did not explicitly refer to the distinction between *chronos* and *kairos*.⁴⁹

“Zum antiken Begriff des Kairos,” *Zeitschrift für philosophische Forschung* 27, no. 2 (1973): 256–74, doi:10.2307/40279616. On *kairos* in Aristotle’s rhetorical and ethical works see: James L. Kinneavy and Catherine R. Eskin, “Kairos in Aristotle’s Rhetoric,” *Written Communication* 11, no. 1 (1994): 131–42, doi:10.1177/0741088394011001006.

⁴⁷ John E. Smith, “Time, Times, and the ‘Right Time’; Chronos and Kairos,” *The Monist* 53, no. 1 (1969): 9.

⁴⁸ Tillich published several books on this topic, and conceives of *kairos* in an eschatological vein. On this reading of the New Testament, *kairos* is closely linked to Christ’s coming to the world. See: Andrew O’Neill, *Tillich: A Guide for the Perplexed* (London/New York: T & T Clark, 2008), 15–9, 24, 69, 75–9. For an analysis of Tillich’s notion of *kairos* against the backdrop of his systematic theology see: Oswald Bayer, “Tillich as a Systematic Theologian,” in *The Cambridge Companion to Paul Tillich*, ed. Russell Re Manning (Cambridge/New York: Cambridge University Press, 2009), 18–19, 32.

⁴⁹ Space constraints prevent me from further exploring this illuminating link further. On the intricate connections between 20th Century political theology and IR theory, see: Nicolas Guilhot, “American

This is why it appears vital to revisit the ancient roots of the distinction.⁵⁰ In modern English language use, we tend to collapse these two conceptions of time into one word, but the Greeks drew a line between *chronos* and *kairos* by using two words for two distinct phenomena. Some of the hermeneutic difficulties with our attempts to grasp the meaning of *kairos* can be explained by the obvious fact that the distinction seems rather artificial to us. We use one word and add adjectives to specify it, for instance when we speak of the “right time” for an action. But in ancient Greek culture *chronos* and *kairos* referred to singular kinds of time in the most natural way. When reconstructing the notion of *kairos* we will therefore have to keep in mind that what might perhaps seem contrived to modern language users has been unproblematic and

Katechon: When Political Theology Became International Relations Theory,” *Constellations* 17, no. 2 (2010): 224–53, doi:10.1111/j.1467-8675.2010.00586.x; Jodok Troy, ed., *Religion and the Realist Tradition: From Political Theology to International Relations Theory and Back*, 2014; Vassilios Paipais, “Necessary Fiction: Realism’s Tragic Theology,” *International Politics* 50, no. 6 (2013): 846–62, doi:10.1057/ip.2013.38. On the relationship between Tillich and Niebuhr see: Ronald Stone, “Tillich and Niebuhr as Allied Public Theologians,” *Political Theology* 9, no. 4 (2008): 503–11. On Niebuhr’s peculiar version of Christian Realism see: Robin W. Lovin, *Reinhold Niebuhr and Christian Realism* (Cambridge/New York: Cambridge University Press, 1995); John Marsden, “Reinhold Niebuhr and the Ethics of Christian Realism,” *International Journal of Public Theology* 4, no. 4 (2010): 483–501, doi:10.1163/156973210X526445. On Niebuhr’s wider impact, see: Daniel F. Rice, *Reinhold Niebuhr and His Circle of Influence* (Cambridge/New York: Cambridge University Press, 2013).

⁵⁰ At this point a clarification might seem necessary: Although I turn to ancient philosophy and culture to recuperate this complex notion of time, I shall not advocate an analogous turn to ancient Just War theory. The reason for my reluctance is simple: while it might be possible to trace the deeper origins of Just War theory back to thinkers such as Thucydides and Cicero, the lessons we may draw from these thinkers strike me as altogether too thin to be of substantive value for the contemporary debate. See Gregory M. Reichberg, Henrik Syse, and Endre Begby, eds., *The Ethics of War: Classic and Contemporary Readings* (Malden/Oxford: Blackwell Publishing, 2006), 1–90.

ordinary in its original cultural context. For our purpose, it suffices to highlight the following aspects, through which the Greeks distinguished *chronos* and *kairos*:

One term – *chronos* – expresses the fundamental conception of time as measure, the quantity of duration, the length of periodicity, the age of an object or artefact [...]. The questions relevant to this conception of time are: “How fast?”, “How frequent?”, “How old?” and the answers to these questions can be given, in principle at least, in cardinal numbers or in terms of limits that approach these numbers. The other term – *kairos* – points to a qualitative character of time, to the special position an event or action occupies in a series [...]. The question especially relevant to *kairos* time is “When?”, “At what time?”. *Kairos*, or the “right time”, as the term is often translated, involves ordinality or the conception of a special temporal position [...].⁵¹

Smith’s evocative comparison between cardinal and ordinal numbers is meant to underscore the observation that the opportune moment is special in that it is always inserted in a sequence of events. Just like ordinal numbers, the opportune moment can only be grasped relative to previous and future points in time. *Chronos*, on the other hand, can be associated with cardinal numbers insofar as we use these to simply establish quantities, through counting for example. The distinction between *chronos* and *kairos* can hence be read as an attempt to parse normal, measurable time from qualitative, actionable time.

⁵¹ Smith, “Time, Times, and the ‘Right Time’; Chronos and Kairos,” 1–2.

Smith isolates three essential tenets that set *kairos* apart from *chronos*.⁵² Firstly, mentioning *kairos* indicates that there is a “right time” for action, as opposed to any possible time. When analyzing the bad timing of a political actor’s initiative, we implicitly touch on this dimension of *kairos*. Secondly, *kairos* denotes that a critical point, a parting of the ways, has been reached. This means that a decision about an initiative cannot be longer postponed: one must take a stand and choose a direction to proceed. Thirdly, *kairos* opens up the proverbial window of opportunity for extraordinary action that would otherwise be impossible to undertake. Moments of crisis are also exceptional occasions for change.

More needs to be said about the relation between *chronos* and *kairos*. Sometimes the line separating these two conceptions of time is drawn too sharply, as if actually happening events and their interpretation could always be treated independently from each other. Such a contrast between *chronos* and *kairos* is unnecessarily stark. Any comprehensive reflection on *kairos* would have to acknowledge that seizing the opportune moment always hinges on a sober evaluation of the objective context in which action is taken.⁵³ Hence, the goal is not to replace a focus on *chronos* with an emphasis on *kairos*, but rather to delineate a more complete image of political time by bringing practical reasoning to bear on both the *chronotic* and the *kairotic* dimensions of human affairs.

To what extent does this complex conception of time capture something about political action more specifically? There are two respects in which *kairos* can be

⁵² John E. Smith, “Time and Qualitative Time,” *The Review of Metaphysics* 40, no. 1 (1986): 10–11, doi:10.2307/20128415.

⁵³ Amélie Frost Benedikt, “On Doing the Right Thing at the Right Time: Toward an Ethics of Kairos,” in *Rhetoric and Kairos: Essays in History, Theory, and Praxis*, ed. Phillip Sipiora and James S. Baumlin (Albany: State University of New York Press, 2002), 226–35.

understood to bear on political action: (1) On the one hand, *kairos* may serve as a reminder that political action – that is, action in consort with others – always remains conditioned by temporality. The timing of initiatives under permanently changing circumstances is obviously important for political actors, if they want their policies to be successful. Taking advantage of the opportunity structure is thus a crucial skill for political actors to acquire. Another such skill encompasses the control of political time. Only in fictional scenarios are political questions debated as if there was no time limit to deliberations.⁵⁴ In the real world, the setting of priorities – which topic should be debated first and which last? – makes a massive difference in concrete decisions.⁵⁵ Furthermore, the emphasis on *kairos* points to the fact that political actors often need to take decisions under circumstances of radical uncertainty: they must cultivate the ability to make predictions about possible outcomes before they launch a political or military initiative.

(2) On the other hand, *kairos* can help us make sense of the relation between timeliness and critique. One danger with linking political action to *kairos* is that the skilled political actor then finds herself in the strategic position to brand any critique of her initiatives as “untimely”. It is a common phenomenon in public debates that

⁵⁴ It would be a caricature to present contemporary defenders of deliberative democracy as being unaware of the constraints of temporality. In fact, some of the most relevant innovations in deliberative democracy – such as the use of polling – have their origin in the recognition that citizens experience time as scarce and might thus not be able or willing to devote much energy to deliberations. See: James Bohman, “Survey Article: The Coming of Age of Deliberative Democracy,” *Journal of Political Philosophy* 6, no. 4 (1998): 400–425, doi:10.1111/1467-9760.00061; James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford: Oxford University Press, 2009).

⁵⁵ Raymond Geuss, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008), 31–32.

minority positions are delegitimized by asserting that “now is not the time” for dissent. Critique is thus discarded as inopportune or even pernicious. There is, in fact, no better context to elucidate this observation than debates over warfare. In preparation of and during war, critics are regularly stigmatized as unpatriotic, dangerous and subversive. Insofar as political action extends to the control of time – through the regulation of priorities and the exploitation of opportunity structures – abuse is always a danger, to which critics need to remain alert.⁵⁶

Political actors are thus to be held accountable for their predictions about an initiative’s possible outcomes. Since the distinction between *chronos* and *kairos* indicates that any decision about an initiative occurs in an environment of radical uncertainty, political actors are under an obligation to include in their predictions as many factors as can reasonably be expected, some of which have been outlined in section II. To check whether they indeed comply with this “duty of diligence” is the very goal of critique. Assuming a critical posture in debates over timing in war therefore implies that the justifications for a military or political initiative offered by political actors are viewed with great suspicion.

Kimberly Hutchings develops a wide-ranging theory of *kairos*, and its relevance for political action, that significantly diverges from the account defended above. In her book *Time and World Politics*, Hutchings explores how “assumptions about time enter into the analysis and judgment of world politics”⁵⁷. One of her main

⁵⁶ For two excellent reflections on the relation between timeliness and critique see: Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton: Princeton University Press, 2005); Samuel Allen Chambers, *Untimely Politics*, Taking on the Political (Edinburgh: Edinburgh University Press, 2003).

⁵⁷ Kimberly Hutchings, *Time and World Politics: Thinking the Present* (Manchester: Manchester University Press, 2008), 20.

observations is that theorists in the Western tradition – from Machiavelli onwards – typically associate political action with the ability to mobilize the “powers of *kairos* to regulate, control and transform seasonal or clock time into something different”⁵⁸.

This understanding of political action cuts across various ideological traditions.

Hutchings convincingly demonstrates that, despite their massive differences, liberal defenders of democratic peace, post-Kantians as well as post-Marxist philosophers all rely on broadly comparable notions of “world-political time”.

In her critical response, Hutchings strives to distance herself from the conventional equation of political action with the regulation, control and transformation of time.

Her rival conceptualization is premised on the idea of “heterotemporality”⁵⁹. Through this neologism, Hutchings attempts to delineate a radical alternative to dealing with political time, which “acknowledges multiple temporal orderings and the ways in which they contingently impinge on each other. It rejects accounts of political time that see it in unified or unifying terms, or as transcendently conditioned by some *kairotic* power.”⁶⁰ In sum, Hutchings hopes to emancipate political theory from its unhealthy obsession with *kairos* so that it gets more sensitive to the “sheer volatility and unpredictability of temporal becoming”⁶¹.

Although there can be little doubt that *Time and World Politics* presents us with the most elaborate interpretation of “world-political time” to date, it might be worthwhile

⁵⁸ Ibid., 158.

⁵⁹ Proponents of postcolonial studies have in fact created the notion of “heterotemporality” so as to come to terms with the histories of subaltern peoples. See: Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*, 2nd ed. (Princeton/Oxford: Princeton University Press, 2008).

⁶⁰ Hutchings, *Time and World Politics*, 175.

⁶¹ Ibid., 174.

to interrogate its suitability for grappling with the normative questions of Just War theory. While Hutchings gestures towards the potential of her heterotemporal approach to generate a new kind of normativity, it is not entirely clear what would be gained if we gave up on the idea that political action is, amongst other things, about regulating, controlling and transforming time. As this section has argued, a focus on *kairos* enables us to exercise critique insofar as the decisions of political actors come under scrutiny. It remains vague, though, how the heterotemporal approach may fulfill this task. Assuming that critique is a central tenet of Just War theory, it would therefore be sensible to keep with the notion of *kairos* and resist the temptation, *pace* Hutchings, to radically recast the way in which time matters for politics.

IV. Resetting Time In Just War Theory

Section II unfolded a narrative of legalist Just War theory as leaning towards rules and principles. This orientation, I have suggested, pushes considerations of time beyond the theory's normative purview because time is perceived purely in terms of a measure – the element of *kairos* is hence completely ignored. One effect of this misbalance is that legalist Just War theory remains ill-equipped to uncover attempts at manipulating time. The preponderance of generality and abstractness in contemporary Just War theory has a negative effect on the theory's critical capacity. A recent empirical study has exposed how the consistent framing of an attack as justified can assist liberal states, such as the US in particular, to sell “the decision to go to war to the domestic audience”⁶². This kind of cooptation of Just War theory can at least

⁶² Michael J. Butler, *Selling a “Just” War: Framing, Legitimacy, and US Military Intervention* (Houndmills, Basingstoke, Hampshire; New York: Palgrave Macmillan, 2012), 11. For similar critiques see: Anthony Burke, “Just War or Ethical Peace? Moral Discourses of Strategic Violence

partly be blamed on its inclination to favor rules and principles over the examination of real-world cases, because political actors will have easy play to cloak their interests in terms of generic and abstract values if little attention is paid to the context in which a war is waged. Critics in particular are therefore well advised to embrace case-based reasoning if they wish to hold political actors accountable for their decisions.⁶³

IV.1. Three Examples

So far I have praised the virtues of interpretation and judgment, but I have not yet specified how they operate and how they relate to the complex conception of time described in the section III. To flesh out the point I wish to make, consider the following three cases. Crucially, these examples are not meant to close the discussion about what has been going on in these contexts. Rather, their aim is to rehearse pertinent episodes, in which it became evident that timing is fundamental to the assessment of political and military initiatives. In particular, they will show that a simplistic understanding of time as *chronos* alone is detrimental to Just War theory's critical mission.

The first episode is connected to *jus ad bellum*, and entails the by now well-known build-up to the Gulf War in 1991. Through the condition of “last resort”, Just War theory postulates that going to war can only be justified once – other things being

After 9/11,” *International Affairs* 80, no. 2 (2004): 329–53, doi:10.1111/j.1468-2346.2004.00386.x;

Jon Western, “The War over Iraq: Selling War to the American Public,” *Security Studies* 14, no. 1 (2005): 106–39, doi:10.1080/09636410591002518.

⁶³ On the nexus between judgment and critique see: Nicholas Rengger, “The Judgment of War: On the Idea of Legitimate Force in World Politics,” *Review of International Studies* 31, no. Supplement S1 (2005): 160, doi:10.1017/S0260210505006832.

equal – all the channels of non-violent conflict resolution have been fully exhausted.⁶⁴ The purpose of this norm is to restrain the state's inclination to prematurely wage war when faced with minor provocations. Here, Michael Walzer's approach offers an illuminating angle on the Gulf War in 1991. Whereas he treats the meaning of "last resort" only superficially in *Just and Unjust Wars*⁶⁵, in a later collection of essays called *Arguing about War* Walzer dedicates more space to this issue. In a subsection of this book entitled "Cases", he asks whether the US-led confrontation was indeed triggered in conformity with the "last resort" clause:

Taken literally [...] "last resort" would make war morally impossible. For we can never reach lastness, or we can never know that we have reached it. There is always something else to do: another diplomatic note, another United Nations resolution, another meeting. Once something like a blockade is in place, it is always possible to wait a little longer and hope for the success of [...] nonviolence. [...] But sending troops into battle commonly brings with it so many unanticipated costs that it has come to represent a moral threshold: political leaders must cross this threshold only with great reluctance and trepidation.⁶⁶

In this interpretation of the principle of "last resort", Walzer stresses its cautionary effect. In claiming that "great reluctance and trepidation" must restrain political actors when launching an attack, Walzer implicitly formulates an important criterion of

⁶⁴ John W. Lango, "The Just War Principle of Last Resort," **asteriskos: Revista de Estudos Internacionais e da Paz/Journal of International and Peace Studies* 1, no. 1/2 (2006): 7–23.

⁶⁵ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), 84, 212–113, 218.

⁶⁶ Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2005), 88–89.

critique for Just War theory: that overhasty and reckless maneuvers will necessarily lead to unjust wars. The abstract norm of “last resort” must therefore be subjected to a process of judgment and interpretation in order to specify whether political actors have indeed surpassed the “moral threshold” enshrined in the principle. Walzer makes it clear that dispensing with a “metaphysical”⁶⁷ notion of lastness requires us to engage in case-based reasoning, otherwise the indeterminacy of “last resort” can easily turn into a facile excuse for standing by and for doing nothing. This implies that the sequence of events, which precede and succeed the use of force, have to come under scrutiny. In spite of the availability of further peaceful means, Walzer claims that in 1991 the war was indeed legitimate because the prior blockade of Iraq did not trigger Saddam Hussein’s downfall. While the economic sanctions, which had been in place since the invasion of Kuwait in 1990, could thus have easily been extended, they proved toothless in this particular situation.⁶⁸ In other words, Walzer maintains that peaceful means could undoubtedly have been employed over a sustained period, but they would not have had the desired effect of dismantling the regime. It is vital to see that such a *kairotic* assessment is an eminently critical exercise. It depends on the specificity of the examined case whether enough has been done to avoid a war. By contrast, consider Walzer’s position on the invasion of Iraq in 2003: here he argues

⁶⁷ Ibid., 155.

⁶⁸ This account leaves the question open whether economic sanctions are altogether a morally acceptable alternative to waging war. For a skeptical take on the ethics of sanctions see: Joy Gordon, “A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions,” *Ethics & International Affairs* 13, no. 1 (1999): 123–42, doi:10.1111/j.1747-7093.1999.tb00330.x; Albert C. Pierce, “Just War Principles and Economic Sanctions,” *Ethics & International Affairs* 10, no. 1 (1996): 99–113, doi:10.1111/j.1747-7093.1996.tb00005.x.

that the goal of dismantling Iraq “could almost certainly have achieved with measures short of full-scale war”⁶⁹.

The second episode is linked to *jus in bello*, and refers to Israel’s Operation Cast Lead in 2008/2009. One of the foundational rules and principles of Just War theory stipulates non-combatant, i.e. civilian, immunity.⁷⁰ The idea behind this norm is clear: non-combatants must be safe from any form of military aggression because they are not actively or directly engaged in warfare. This protection, however, does not apply in the case of “collateral damage” (as it is often euphemistically called), when a strike aims at a military target, but also harms non-combatants. Such collateral damage is covered by the doctrine of double effect, which implies a distinction between an act’s intended and its foreseen consequences.⁷¹ Any soldier who might cause collateral damage by foreseeably, but not intentionally killing civilians – for instance by targeting a hostile facility that is close to a hospital or a school – is under an obligation of care: he or she must attempt as much as possible to avoid casualties. But these moral and legal categories are themselves conditioned by time constraints, because soldiers and their commanders act under immense pressure in the battlefield. Therefore, the crucial question is how much risk for their own lives combatants must shoulder when taking precautions to protect non-combatants from harm. In assessing

⁶⁹ Walzer, *Arguing About War*, 160.

⁷⁰ James T. Johnson, “The Meaning of Non-Combatant Immunity in the Just War/Limited War Tradition,” *Journal of the American Academy of Religion* 39, no. 2 (1971): 151–70; James T. Johnson, “Maintaining the Protection of Non-Combatants,” *Journal of Peace Research* 37, no. 4 (2000): 421–48.

⁷¹ C. A. J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008), 132–153; Warren S. Quinn, “Actions, Intentions, and Consequences: The Doctrine of Double Effect,” *Philosophy and Public Affairs* 18, no. 4 (1989): 334–51, doi:10.2307/2265475.

whether soldiers and their commanders exhibited negligence, recklessness or due care in their risky conduct, time constraints play a crucial role.⁷²

To illuminate this observation, consider the policy of Israel's army during the Gaza War in 2008/2009 to warn civilians whose houses were in the proximity of a military target, through leaflets and phone calls, that the area where they lived would soon be attacked.⁷³ According to one of the champions of this policy, more than 150.000 such phone calls were made over the three weeks of Operation Cast Lead.⁷⁴ Recent attacks on military targets in Gaza were also preceded by phone calls from the Israel Defense Forces (IDF), which gave the civilian inhabitants only five minutes to leave their homes before they would be destroyed.⁷⁵ As one commentator remarked, "[b]y giving residents the choice between death and expulsion, [...] one phone-call turns 'non-

⁷² On the provisions in international law surrounding this issue see: Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge/New York: Cambridge University Press, 2004), 125–126.

⁷³ "IDF Phones Gaza Residents to Warn Them of Imminent Strikes," *Haaretz*, January 2, 2009, <http://www.haaretz.com/news/idf-phones-gaza-residents-to-warn-them-of-imminent-strikes-1.267350>; Steven Erlanger, "A Gaza War Full of Traps and Trickery," *The New York Times*, January 11, 2009, sec. International / Middle East, <http://www.nytimes.com/2009/01/11/world/middleeast/11hamas.html>.

⁷⁴ Asa Kasher, "A Moral Look at Operation Cast Lead and the Gaza War," *Jerusalem Center For Public Affairs* 9, no. 18 (2010), <http://jcpa.org/article/a-moral-evaluation-of-the-gaza-war-%e2%80%93-operation-cast-lead/>. Kasher is also the co-author of another paper, which seeks to outline the perspective of the Israeli army on fighting terror. See: Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4, no. 1 (2005): 3–32, doi:10.1080/15027570510014642.

⁷⁵ Alexander Marquardt and Mark Mooney, "Gaza: A Warning Call, Then Missiles," *ABC News*, November 19, 2012, <http://abcnews.go.com/International/israel-palestinian-conflict-phone-call-tells-gazans-missiles/story?id=17762083>; "Israel Intensifies Gaza Bombing," *BBC*, November 16, 2012, sec. Middle East, <http://www.bbc.co.uk/news/world-middle-east-20351553>.

combatants' into 'human shields'”⁷⁶. The need to consistently distinguish between combatants and non-combatants was thus translated into a *chronotic* question: giving civilians five minutes to leave is an extremely coarse-grained rubric to establish a resident's status as a combatant.

In reaction to propositions that Israel's army had complied with the norm of non-combatant immunity during the Gaza war, Avishai Margalit and Michael Walzer argue that such measures as dropping leaflets or making phone calls do not add up to an adequate standard of care concerning the protection of civilians.⁷⁷ A hurried notification of an impending attack is not sufficient to ensure that civilians will be spared from violence. What would have been necessary is, at the very least, to ascertain that non-combatants have indeed cleared the area on which a strike would be launched.⁷⁸ Does this mean that soldiers and their commanders have an infinitely demanding obligation of care in avoiding “collateral damage”? Margalit and Walzer respond that this is not so – combatants are not required to take “suicidal risks” in eliminating the possibility of accidentally killing civilians. This would render warfare altogether impossible. But an examination of Israel's policy during the Gaza War demonstrates that in this particular case not enough precaution was taken. Indeed, the leaflets and phone calls ahead of the Israeli strikes had the sole purpose of devising a

⁷⁶ Eyal Weizman, “Lawfare in Gaza: Legislative Attack,” *openDemocracy*, March 1, 2009, <http://www.opendemocracy.net/article/legislative-attack>.

⁷⁷ Avishai Margalit and Michael Walzer, “Israel: Civilians & Combatants,” *The New York Review of Books*, May 14, 2009. For a similar critique of Kasher and Yadlin's position see: David J. Luban, *Risk Taking and Force Protection*, SSRN Scholarly Paper (Rochester: Social Science Research Network, May 29, 2011), <http://papers.ssrn.com/abstract=1855263>.

⁷⁸ Asa Kasher et al., “‘Israel & the Rules of War’: An Exchange,” *The New York Review of Books*, June 11, 2009, <http://www.nybooks.com/articles/archives/2009/jun/11/israel-the-rules-of-war-an-exchange/>.

normalized procedure to guarantee that any civilian casualties would appear to be the regrettable result of “collateral damage”. The five-minutes warnings are therefore a good illustration of the dangers of the “moral slide-rule” when it is applied in a concrete conflict. What the distinction between combatants and non-combatants in reality requires is a careful contextual analysis of the minimal risks soldiers and their commanders ought to take in the battlefield.⁷⁹ The IDF’s approach to avoiding civilian casualties thus highlights what happens when judgment and interpretation are substituted by an extremely coarse-grained rubric, generated by Just War Theory’s “moral slide-rule”.

The third episode relates to *jus post bellum*, and involves the case levelled against Sudanese President Omar Al-Bashir by the International Criminal Court (ICC) in 2009.⁸⁰ To this date, Al-Bashir’s case represents the only incident where the ICC has indicted a sitting head of state, thereby annulling his right to immunity. Its then chief prosecutor, Luis Moreno Ocampo, issued an arrest warrant for war crimes, genocide

⁷⁹ To make things even more complicated, there are good reasons to believe that the assessment of proportionality in war will differ according to the perspective from which it is undertaken. Bohrer and Osiel argue convincingly that proportionality requirements will look different at the tactical, operational and strategic levels. See: Ziv Bohrer and Mark Osiel, “Proportionality in Military Force at War’ s Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers,” *Vanderbilt Journal of Transnational Law* 46 (2013): 747–822.

⁸⁰ “Warrant Issued for Sudan’s Leader,” *BBC*, March 4, 2009, sec. Africa, <http://news.bbc.co.uk/1/hi/world/africa/7923102.stm>; Marlise Simons and Neil Macfarquhar, “Court Issues Arrest Warrant for Sudan’s Leader,” *The New York Times*, March 5, 2009, sec. International / Africa, <http://www.nytimes.com/2009/03/05/world/africa/05court.html>; Marlise Simons, “International Court Adds Genocide to Charges Against Sudan Leader,” *The New York Times*, July 12, 2010, sec. World / Africa, <http://www.nytimes.com/2010/07/13/world/africa/13hague.html>.

and crimes against humanity, allegedly committed in 2003.⁸¹ Although the arrest warrant has until now not been executed, it stands to reason that the ICC's indictment exerted a profound impact on international criminal justice around the globe.⁸² The tribunal's actions continue to affect in particular the prospects of lasting peace in post-conflict societies on the African continent.

Several analysts have remarked that the ICC's charge remained caught between a dilemma that has long been recognized and debated in the literature on transitional justice: peace v. justice.⁸³ Critics have accused the prosecutor's strategy of "human rights fundamentalism"⁸⁴, essentially contending that the tribunal's quest for retributive justice destabilized projects of political reform in Africa. These critics

⁸¹ Alex de Waal and Gregory H. Stanton, "Should President Omar Al-Bashir of Sudan Be Charged and Arrested by the International Criminal Court?," *Genocide Studies and Prevention* 4, no. 3 (2009): 329–53, doi:10.3138/gsp.4.3.329; Robert Cryer, "The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision," *Journal of International Criminal Justice* 7, no. 2 (May 1, 2009): 283–96, doi:10.1093/jicj/mqp029; Andrew T. Cayley, "The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide," *Journal of International Criminal Justice* 6, no. 5 (2008): 829–40, doi:10.1093/jicj/mqn071.

⁸² Leslie Vinjamuri, "Deterrence, Democracy, and the Pursuit of International Justice," *Ethics & International Affairs* 24, no. 2 (2010): 191–211, doi:10.1111/j.1747-7093.2010.00256.x.

⁸³ The dilemma between peace and justice has been a bone of contention for more than a decade. In recent years, authors have attempted to show that the dilemma is in fact a false one, highlighting instead the mutual implication of peace and justice. Among the most influential contributions to the debate are: Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004); Naomi Roht-Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge: Cambridge University Press, 2006); Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

⁸⁴ Mahmood Mamdani, "Beware of Human Rights Fundamentalism," *Pambazuka News*, March 26, 2009, <http://www.pambazuka.org/en/category/comment/55143>.

have also submitted that the ICC acted in an irresponsible manner as it completely ignored the timing of its initiative.⁸⁵ By issuing the arrest warrant in a very volatile environment, Ocampo jeopardized diplomatic efforts to end the humanitarian crisis in Darfur.

Scrutinizing this episode against the backdrop of a complex conception of time, it becomes evident that the ICC largely ignored the *kairotic* dimension of its prosecutorial ambitions. While Ocampo clearly hoped to increase the ICC's deterrence power, he chose to disregard the wider implications of his actions by insisting on its impartial and independent mandate. The ICC's "judicial romanticism"⁸⁶ – its deliberate ignorance of the context in which it operates – may therefore block the road to peace when indictments occur at inauspicious junctures. Peace is not necessarily and always advanced by international criminal justice; it may even be undermined if the time for its pursuit is not right. Establishing whether the time for prosecutions has arrived is a challenge that can only be tackled if we weigh the good of retributive justice against other goods, such as the preservation of peace. This emphasis on the *kairos* of retributive justice projects is, of course, not to say that former perpetrators should enjoy impunity forever. The indictment of Al-Bashir

⁸⁵ Afua Hirsch, "Peace v Justice: The ICC's Dilemma," *The Guardian*, March 6, 2009, <http://www.theguardian.com/commentisfree/2009/mar/06/sudan-war-crimes1>; Julie Flint and Alex de Waal, "To Put Justice Before Peace Spells Disaster for Sudan," *The Guardian*, March 6, 2009, <http://www.theguardian.com/commentisfree/2009/mar/06/sudan-war-crimes>; Simon Robinson, "Choosing Justice Over Peace in Darfur," *Time*, accessed August 13, 2013, <http://www.time.com/time/world/article/0,8599,1822529,00.html>.

⁸⁶ Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism," *Human Rights Quarterly* 31, no. 3 (2009): 624–54, doi:10.1353/hrq.0.0096.

merely serves as an illustration of the fact that the timing of trials as a mechanism of securing *jus post bellum* calls for a subtle investigation into a great variety of factors.⁸⁷ Ultimately, the goal in these trials must be to craft a compromise between a search for retributive justice measures and prudential considerations about the timing and scope of these measures.⁸⁸

These remarks on the timing of prosecutions by the ICC are not intended to unearth a structural flaw in all mechanisms of international justice. The ICC itself certainly suffers from a number of grave shortcomings, ranging from its unfortunate perception as a vehicle of “legal colonialism” on the African continent, to its lack of support from powerful nations such as the USA, China and Russia.⁸⁹ These criticisms notwithstanding, there have recently been signs, in particular in the Kenya case, that the ICC may be obliged to change course with regard to its prosecutorial ambitions.⁹⁰

⁸⁷ Laurel E. Fletcher, Harvey M. Weinstein, and Jamie Rowen, “Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective,” *Human Rights Quarterly* 31, no. 1 (2009): 163–220, doi:10.1353/hrq.0.0058.

⁸⁸ Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” *International Security* 28, no. 3 (December 1, 2003): 5–44, doi:10.2307/4137476.

⁸⁹ Harmen van der Wilt, “Universal Jurisdiction under Attack An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States,” *Journal of International Criminal Justice* 9, no. 5 (November 1, 2011): 1043–66, doi:10.1093/jicj/mqr045; Catherine Gegout, “The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace,” *Third World Quarterly* 34, no. 5 (2013): 800–818, doi:10.1080/01436597.2013.800737.

⁹⁰ Kenneth Roth, “Africa Attacks the International Criminal Court,” *The New York Review of Books*, February 6, 2014, <http://www.nybooks.com/articles/archives/2014/feb/06/africa-attacks-international-criminal-court/>.

Therefore, it is conceivable that an adjustment in the ICC's institutional culture might lead to a better balance between principle and pragmatism in international justice. These three examples demonstrate that many of the provisions in Just War theory about time constraints remain underdetermined in their generality and abstractness. There is nothing in the principle of "last resort" that would define per se when all means of non-violent conflict resolution have been exhausted – only a case-based analysis of the events and of the efficacy of peaceful measures preceding the use of force can establish whether resorting to war is legitimate. Similarly, it is impossible to determine the level of risk soldiers and their commanders must take in protecting civilians, without looking closely at the specificity of the conflict on the ground – a normalized procedure to separate civilians from combatants, such as the IDF's five-minutes warnings, is likely to conceal the true extent of collateral damage, instead of protecting non-combatant immunity. Finally, the imperative to prosecute perpetrators of mass atrocity cannot be seen in isolation from other objectives, such as the preservation of peace – when it is safe to pursue justice thus becomes a matter of trading off various incommensurable goods.

IV.2. Towards an Integrative Framework: The Pragmatist *Ethos*

In the introduction, I have maintained that the purpose of this paper is recalibrating Just War's emphasis on rules and principles. What is the most suitable framework for such an endeavour? I should start by underscoring that my concluding remarks will not culminate in a perfectly drawn picture of an alternative to legalism; rather, they will offer a rough, yet hopefully precise sketch of the alternative's contours. A promising step towards such a sketch would be to mobilize some of the key characteristics of the pragmatist *ethos* so as to render judgment and interpretation in

war more effective. This *ethos* would allow Just War theory to once again sharpen its critical edge by emphasizing that an acknowledgment of the fallibility of judgment is compatible with the defence of firm convictions. Although it is notoriously difficult to define pragmatism as a coherent movement, I wish to draw on the political-theoretical dimension of this tradition in Anglo-American philosophy for a specific reason: classical, as well as contemporary, pragmatists stress the importance of *experience* for the development of theoretical positions. Pragmatism – in the wider sense, going beyond the historical founding figures of James, Peirce and Dewey – examines the many ways in which we share and construct the social world.⁹¹ Following Richard Bernstein’s characterization of the pragmatist *ethos*, we may isolate five distinct ideas shared by all pragmatists:⁹² a) anti-foundationalism, i.e. the idea that beliefs have no firm footing in transcendental certainty; b) fallibilism, i.e. the idea that all knowledge is open to further inquiry and critique; c) the necessity of a critical community, i.e. the idea that the self has a social character, d) an awareness of contingency, i.e. the idea that philosophy cannot fully master the world as an “open universe”, and e) plurality, i.e. the idea that there is always a multiplicity of traditions, from which no human being can escape. Applied to our topic, we might infer that pragmatic fallibilism envisages decisions over timing in warfare as positions that must ultimately remain open to further inquiry and critique. Political actors often have a vested interest in

⁹¹ Cheryl Misak, *Truth, Politics, Morality: Pragmatism and Deliberation* (London: Routledge, 2000); Cheryl Misak, ed., *New Pragmatists* (Oxford: Clarendon Press, 2007); John R. Shook and Joseph Margolis, eds., *A Companion to Pragmatism*, Blackwell Companions to Philosophy 32 (Malden, MA: Blackwell Pub, 2006); Robert B. Talisse, *Democracy After Liberalism: Pragmatism and Deliberative Politics* (New York: Routledge, 2005).

⁹² Richard J. Bernstein, “Pragmatism, Pluralism and the Healing of Wounds,” *Proceedings and Addresses of the American Philosophical Association* 63, no. 3 (1989): 5–18.

closing the horizon for inquiry and critique such that their decisions appear incontestable. In response to this tendency, Just War theory should aim at vigorously and vociferously questioning these decisions. Those who subscribe to the premises of pragmatic fallibilism have the advantage of offering a normatively satisfying response to this challenge. Pragmatism is especially apt as a framework for thinking through time in warfare because it combines fallibilism with anti-skepticism.⁹³ While all decisions about timing must remain open to further revisions, this general disposition does not lead to relativism of the sort that all decisions are equally justified. Rather, pragmatists foreground the notion of a “critical community” of inquirers that strives to hold political actors accountable for their words and deeds. It is this dual commitment to a fallibilistic mentality and a vehement rejection of relativism that reveals an advantage over the legalist framework outlined in section II. Whereas Just War Theory of the legalist variety promises more than it can keep, Just War Theory in a pragmatist vein strikes a balance between the judging and interpreting of real-world cases and the elaborating on rules and principles. Since case-based reasoning is ultimately reliant on the capacity to discern highly contentious situations, these ideas, which together form the basis for a pragmatist *ethos*, seem suitable for resisting the “tyranny of principles”⁹⁴.

Bernstein rightly underlines that pragmatists have for a long time been accused of lacking the stamina to stand up for the values they uphold. Critics regularly accuse pragmatists of being too feeble and flexible in their convictions – a flaw that becomes

⁹³ Jack Knight and James Johnson, *The Priority of Democracy: Political Consequences of Pragmatism* (Princeton/Oxford: Princeton University Press, 2011), 27.

⁹⁴ I borrow this memorable phrase from a paper of Stephen Toulmin’s, which should become the basis of *The Abuse of Casuistry*: Stephen Toulmin, “The Tyranny of Principles,” *The Hastings Center Report* 11, no. 6 (December 1, 1981): 31–39, doi:10.2307/3560542.

particularly virulent in times of warfare, when unbending commitments to certain values are needed. However, Bernstein objects to this deprecating depiction of pragmatism that it misconstrues the nature of those commitments that are compatible with pragmatic fallibilism. Drawing on the philosophy of Sidney Hook, he asserts that the very idea of pragmatic fallibilism is embedded in a “tragic sense of life”⁹⁵. This is how Bernstein sums up his view:

We not only have to make difficult choices, but [...] we are frequently faced with moral and political dilemmas where there are incompatible and irreconcilable values. This is precisely why pragmatists place so much emphasis on deliberation, inquiry, and the careful evaluation of consequences of our decisions and actions. [...] It is a misleading caricature of the pragmatic mentality to suggest it calls for endless debate. It is difficult to think of another philosophical orientation that has placed so much emphasis on conduct, practice, and action. There is no incompatibility between being *decisive* and recognizing the *fallibility* and limitations of our choices and decisions. On the contrary, this is what is required for *responsible* action.⁹⁶

Therefore, pragmatic fallibilism is not pacifist in an absolute sense: it allows for commitments to be strong enough to justify the decision to use violence, so long as these commitments are the result of as much “deliberation, inquiry, and the careful evaluation of consequences of our decisions and actions” as possible. Regarding our

⁹⁵ Richard J. Bernstein, *The Abuse of Evil: The Corruption of Politics and Religion Since 9/11* (Cambridge: Polity Press, 2005), 56. Bernstein takes this phrase (“tragic sense of life”) from the following of Hook’s papers: Sidney Hook, “Pragmatism and the Tragic Sense of Life,” *Proceedings and Addresses of the American Philosophical Association* 33 (1959): 5–26, doi:10.2307/3129513.

⁹⁶ Bernstein, *The Abuse of Evil*, 57–58.

topic, this means that decisiveness about one's convictions must be paired with alertness to the manipulability of political time. Here, the notion of pragmatic fallibilism can offer guidance as to what should be done. This does not mean that pragmatic fallibilism will establish the substantial outcome of processes of judgment and interpretation. However, it may provide an integrative framework for grappling with timing. Principles and rules will naturally play a part in this; but they are only the beginning, not the end of any cogent reflection on the permissible use of force. As the tentative discussion of the three case studies above has shown, there is ultimately no way around a careful contextual analysis of a great variety of factors that impinge on the justice of warfare. In this respect, again, Just War Theory in a pragmatist vein differs significantly from its legalist competitor.

To restate the main points I have ventured to defend: this paper has not intimated that we should discount the project of normatively assessing warfare altogether. Rather, it has maintained that a thorough engagement with the empirical circumstances of justice, such as the issue of timing, leaves Just War theory better prepared to fulfil its critical vocation. This move away from legalism, I have suggested, will require us to consider both the *chronotic* and the *kairotic* dimensions of political time. While I have not tried to construe a full-fledged system of thought to rival legalism, the paper has disclosed a possible avenue for recovering case-based reasoning in the context of examining war – through the revisable, yet anti-sceptical attitude of pragmatism.

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